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PP

v.

JITWEER SINGH OJAGAR SINGH

B

HIGH COURT MALAYA, SHAH ALAM
ASMABI MOHAMAD JC
[CRIMINAL TRIAL NO: 45-118-2008]
30 AUGUST 2010

C ***CRIMINAL LAW:*** *Penal Code - Section 302 - Murder - Ingredients to establish - Whether cause of death proven*

CRIMINAL PROCEDURE: *Prosecution - Prima facie case - Maximum evaluation test - Whether prosecution proved ingredients to establish prima facie case - Looi Kow Chai & Anor v. PP*

D

EVIDENCE: *Hearsay - Cautioned statement - Unavailability of maker of statement - Whether proved - Effect and repercussion - Evidence Act 1950, s. 32(1)*

E ***EVIDENCE:*** *Witness - Prosecution's failure to call witness - Presumption of adverse inference - Whether witnesses material - Evidence Act 1950, s. 114(g)*

The accused was charged with the murder of his wife. The forensic pathologist stated that the cause of death was asphyxia, due most likely to smothering or pressure on the neck due to broad soft ligature. Although 21 witnesses were called by the prosecution, two persons, namely the driver and the housekeeper, who had been interviewed by the police and had given their respective statements, were not called. The primary issue that arose was whether a *prima facie* case had been made out by the prosecution, and in any case whether the prosecution's failure to call the driver and the housekeeper here could trigger the adverse invocation of s. 114(g) of the Evidence Act 1950 against it.

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H **Held (acquitting and discharging accused):**

(1) An essential ingredient in relation to a charge of murder under s. 302 of the Penal Code is to establish the cause of death. It was stated by the forensic pathologist that the deceased died of asphyxia, due to most likely smothering or pressure on the neck due to broad soft ligature. It was also stated that it

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was difficult, if not impossible to arrive at such finding without some background data. The cause of death of the deceased therefore, remained unproved. (paras 23-25)

(2) None of the 21 witnesses called to testify against the accused, had testified by way of direct evidence that it was the accused and no one else who had perpetrated the crime or that it was the accused who had caused the death of the deceased. (para 26)

(3) The prosecution had failed to call at least two material witnesses whose testimonies were crucial to its case, namely the housekeeper and the driver, who would be able to provide some missing links in the prosecution's case. The absence of the driver and the housekeeper left many questions unanswered. The prosecution had failed to discharge the onus placed upon them to exclude the possibility of these witnesses having been involved with the commission of the offence. (para 32)

(4) The prosecution attempted to produce the statement of the driver made under s. 112 of the Criminal Procedure Code ('CPC') pursuant to s. 32 of the Evidence Act 1950 ('Act'). However it was rejected by the court as the prosecution had not fulfilled the prerequisite under the said section. Pursuant to s. 32 of the Act, the prosecution has to prove that the witnesses could not be found or that his attendance could not be procured without the amount of delay and expense. From the evidence it was obvious that no diligent search or reasonable exertions were made to procure these witnesses for the trial. The failure to call these witnesses will result in the provision of s. 114(g) of the Evidence Act 1950 to be invoked against the prosecution. (para 33)

(5) On the maximum evaluation of the evidence adduced therefore, the prosecution had left many gaps in its case leaving doubts as to how the deceased had succumbed to her death. Based on the principles of law as regards to the circumstantial evidence as enunciated in the authorities, there was insufficient circumstantial evidence to connect the accused to the offence of murder. The circumstantial evidence adduced by the prosecution fell short of the standard required by the

A law. Hence, all the essential ingredients of murder except for one had not been proved by the prosecution on the standard required by s. 180 of the CPC. (para 31)

Case(s) referred to:

B *Balachandran v. PP [2005] 1 CLJ 85 FC* ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
PP v. Hanif Basree Abdul Rahman [2008] 4 CLJ 1 FC ***(refd)***
PP v. Karim Ab Jaabar [2002] 7 CLJ 191 HC ***(refd)***
C *PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC* ***(refd)***
PP v. Nordin Awang [2000] 1 LNS 288 HC ***(refd)***
PP v. Tan Sri Kasitah Gaddam [2009] 1 LNS 741 HC ***(refd)***

Legislation referred to:

D Criminal Procedure Code, ss. 112, 180, 396
Evidence Act 1950, ss. 32, 114(g)
Penal Code, ss. 299, 300(a), (b), (c), (d), 302

For the prosecution - Wan Zuraidah Wan Nawan DPP
For the accused - Karpal Singh; M/s Karpal Singh & Co

E *Reported by EM Goh*

JUDGMENT

F **Asmabi Mohamad JC:**

Introduction

[1] The accused was charged with the murder of his wife, one G Shento Kaur a/p S Jaswant Singh ("the deceased") on 22 October 2007 at premises No. 27, Jalan 2/3, Bandar Country Homes, Rawang, Selangor.

[2] 21 witnesses were called by the prosecution to prove the elements of the charge against the accused. On 30 August 2010, H after having heard the evidence of these 21 witnesses and the submissions of both learned counsel of the accused as well as learned Deputy Public Prosecutor (DPP) this court ruled that the prosecution has failed to prove a *prima facie* against the accused and the accused was discharged and acquitted of the charge I against him.

[3] The public prosecutor being dissatisfied with the said decision now appeals to the Court of Appeal Malaysia against the whole decision.

The Charge

[4] The accused in this case was charged as follows:

> Bahawa kamu pada 22hb Oktober 2007 jam di antara 7.00 pagi hingga 8.10 minit pagi, bertempat di No. 27, Jalan 2/3, Bandar Country Homes, Rawang di dalam Daerah Gombak di dalam Negeri Selangor Darul Ehsan, telah melakukan kesalahan membunuh iaitu menyebabkan kematian ke atas Shento Kaur a/p S. Jaswant Singh (K/P No. 610530-01-5532) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

Duty Of The Judge At The End Of Prosecution's Case

[5] At the close of the prosecution case, it is incumbent on the court to determine whether or not the prosecution has established a *prima facie* case in accordance with s. 180 of the Criminal Procedure Code (CPC).

[6] What constitutes a *prima facie* case has been succinctly illustrated by Suraya Othman J in the case of *Public Prosecutor v. Tan Sri Kasitah Gaddam* [2009] 1 LNS 741; [2009] 6 MLJ 494 at p. 495:

> A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. A maximum evaluation of the credibility of every prosecution witnesses must be done at the close of the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence. A maximum evaluation of the prosecution's case does not mean that the prosecution must prove its case beyond a reasonable doubt at that stage. What it means is that the prosecution must prove each and every essential ingredients of the offence by credible and reliable evidence which has been filtered and sieved through the positive process of evaluation. There should not be any material gaps in the evidence then the inference that is most favourable to the accused shall be drawn.

[7] In *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 His Lordship Gopal Sri Ram JCA has set out the duty of the trial judge at the close of the prosecution's case as follows:

> ... a judge sitting alone under section 180 of the CPC must subject the prosecution evidence to maximum evaluation and to ask himself the question 'If I decide to call upon the accused to enter his defence and if he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case?' If the answer was in the negative, then no *prima facie* case had been made out and the accused would be entitled to an acquittal.

[8] The above proposition by His Lordship Gopal Sri Ram JCA has been affirmed by two Federal Court cases of *Balachandran v. PP* [2005] 1 CLJ 85 and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457.

[9] Bearing in mind the principles enunciated in the above cases I shall now evaluate the evidence adduced before me in order to ascertain whether the prosecution had discharged the burden placed upon them by s. 180 of the CPC and the decided cases that I have discussed in the preceding paragraphs.

Prosecution's Witnesses

[10] For ease of reference and for the reason that I will later discuss in this judgment I propose to lay down the gist of the testimonies of the witnesses summoned by the prosecution as follows:

SP1 – Daramjit Singh Jitweer Singh

SP1 is the eldest son of the accused and the deceased. At the time of the incident, SP1 was 17 years old and lived alone in a rented condominium known as Platinum Villa Condominium Setapak, Kuala Lumpur which is about five minutes walk from the accused's condominium. His mother, the deceased lived in their family house at No. 27, Jalan 2/3, Bandar Country Homes, Rawang, Selangor (the 'said house'). SP1 came to know of his mother's death from his aunt one Dasmit Kaur. SP1 could not remember the exact date he visited the deceased but said it was two or three days prior to the deceased's death. During this visit SP1 observed that the deceased was not well and looked rather pale. In the evening, SP1 bought some food for the deceased and left for his rented condominium. SP1 described the relationship between his parents as good, just like any other married

couple. However on the next note, SP1 said his parents used to quarrel frequently during their marriage and even during their family trip to the Genting Highlands they had quarreled and his mother was seen throwing things at his father.

SP2 – Kurdip Singh Ojagar Singh

SP2 is the elder brother of the accused. On the morning of 22 October 2007, SP2 had received a phone call from his sister, one Daljit Kaur informing him about the death of the deceased. As soon as SP2 received the news about the death, SP2 had asked his eldest son Jetdaur Singh to go to his brother's house to take a look at the situation there and that he would follow suit. SP2 arrived at the said house around 9am. At the said house SP2 met his brother-in-law one Dato' Satvinder Singh, Dr Gurmit Singh, his son Jegdeep and his nephew Ishvinder. SP2 inquired from the Dr Gurmit as to how the deceased had died and since he did not see the accused downstairs, the where about of the accused. Dr Gurmit told SP2 that his brother was in his room upstairs and had refused to come down. After hearing this SP2 went straight up to the room and there SP2 saw the accused crying and only had a towel wrapped around his body. SP2 saw the body of the deceased lying on the bed. SP2 asked the accused if there was anything that he could do to assist, the accused responded by saying that he had to pick up his children.

SP2 then went downstairs to consult Dr Gurmit and was told that the deceased was an asthmatic patient and most probably she could have died due difficulty in breathing. On the advice of Dr Gurmit, SP2 together with his son proceeded to the Rawang Police Station to make a report. At the police station, SP2 met one Sergeant Yahaya bin Adam (SP15) and told SP15 the intention of his visit and was told that he would not be able to make a report unless he had with him some form of identification document in respect of the deceased. SP2 went back to the said house to get the document and returned to the same police station at about 11.30am with the deceased's bank book. A police report was then lodged wherein SP2 had stated the cause of death as asthmatic attack – most probably due to difficulty in breathing. SP2 went back to the said house with the burial certificate issued to him.

The moment SP2 stepped into the said house SP2 asked the accused if he could prepare for the burial rights. The accused told SP2 not to do anything until some close members of the deceased arrived at the said house. At about 5pm, the deceased's brother one Dr Gurdial Singh S Jaswant Singh (SP4) turned up at the said house and held discussions with the accused. After the discussions the accused told SP2 to follow whatever SP4 said. SP4 told SP2 that he wanted to make a second police report for purposes of post mortem to ascertain the cause of death. SP2 told SP4 to proceed with the next move and that he was tired and wanted to go back to his house to freshen himself up and would call SP4 later. At about 8pm on the same day, SP2's sister had called SP2 to inform SP2 that SP4 was waiting for SP2 to go to the police station. SP2 told his sister to ask SP4 to go to the police station and that he would meet SP4 at the police station. At the police station SP4 told SP2 since SP2 had made the first report he should cancel his first report and make a second report. SP2 then made the second report and told the police the reason for his second report was for the purpose of the post mortem. The report is as exh. P4 (Rawang Report 008385/07). The burial certificate which was issued to SP2 earlier was handed back SP15.

SP3 – Dr Paramjit Kaur Narajan Singh

On 21 October 2007 at about 9.15pm, SP3 received a telephone call from the deceased on her mobile phone. As SP3 was attending to a patient at that time, SP3 did not answer the call. Soon after that, and two hours that followed, SP3 tried in vain to reach the deceased. However during one of the calls made to the deceased's mobile phone, SP3 realised that there was a voice message on her phone which was not meant for her to listen. It was a conversation between two people that got recorded on her phone wherein, SP3 had heard the voice of the deceased talking to another person and saying that her hand was broken and that she wanted to make a police report. SP3 sensed that something could be wrong with the deceased and made several attempts to contact the deceased but there was no reply from the deceased.

On 22 October 2007 at about 9.45am, SP3 received a phone call from her sister-in-law Madam Savinder Kaur informing her about the death of the deceased. At the time SP3 received the news, SP3 thought that the deceased had only broken her arm and not passed away and that her sister-in-law Savinder Kaur could have been mistaken. However SP3 was assured by her sister-in-law that it was the accused himself who had conveyed the news to her. SP3 then called the accused to verify the news and the accused had confirmed it. The accused told SP3 that the deceased had died due to overdose of sleeping pills and that he had already examined the deceased's body and confirmed the death. SP3 told the accused that since the deceased had died at an early age and had no history of any chronic illness there was a need for a post mortem to ascertain the cause of death.

The accused had also told SP3 that he had gone to the said house in the morning and found the deceased in that state in the master bedroom bed. When SP3 asked the accused what was the deceased wearing SP3 was told that the deceased was dressed up and was not in her regular clothes of batik kaftan. The accused had also told SP3 at the time he arrived at the said house there was no one else in the said house and that he had sent the driver out to buy breakfast.

According to SP3, the deceased lived in the said house and the accused lived elsewhere. SP3 knew that the couple had some marital problems and decided to live separately. The deceased had called SP3 on many occasions to discuss her marital problems. There were instances where the deceased had left the said house and come alone to stay with SP3. The last time the deceased had left the said house was in year 2004 where the deceased had come to SP3's house in Kluang to stay for almost three months and thereafter the deceased stayed with SP3's mother for another six months. SP3 had taken the deceased back to Rawang for purposes of reconciliation with the accused and had also advised the deceased that in view of her continuous marital problems the deceased could consider for a reconciliation with the accused for the sake of their children and family or leave the accused to start a new life.

A SP3 had surrendered her phone, a Nokia phone and her sim card with the number 012-7201953 to SP16 for further investigation.

SP4 – Dr Gurdial Singh S Jaswant Singh

B SP4, is an elder brother of the deceased and the husband of SP3. On the 22 October 2007 SP4 happened to be in Kuala Lumpur and had received a call from his wife (SP3) informing him of the death of the deceased. After SP4 heard the news SP4 headed to the said house and arrived at the said house C between 3.30 to 4pm. The moment SP4 reached the said house, SP4 was told that the body of the deceased was in a room at the 1st floor of the said house. SP4 then went up to the said room and there, SP4 saw the deceased, well placed in bed and was dressed up well with a blanket covering the D body. SP4 then came downstairs to wait for the accused.

SP4 was shocked to hear the news that the deceased had died due to asthmatic attack or bronchitis as no one in his family had history of these illnesses. SP4 waited for the E accused to come back to find out the details of the circumstances that led to the deceased's death.

The accused came back in the evening and took SP4 upstairs to where the deceased was lying and told SP4 that the F deceased had died due to overdose. When probed by SP4, the accused said that a gastric lawage could be performed (inserting a small tube into the stomach to extract contents of stomach) to find out the cause of death.

G After some discussions SP4 and the accused had come to the conclusion that there was a need for a post mortem as the deceased had died at a young age and had no history of chronic illness. The accused had asked his brother (SP2) to follow SP4 to the police station to make a report for purposes H of a post mortem.

After the report was lodged the body of the deceased was taken to the Sg Buloh Hospital for a post mortem. SP4 was at the Hospital during the post mortem. The deceased was cremated after the post mortem. However the accused did I not attend the said funeral.

According to SP4 the accused and the deceased were registered first before they went through their customary marriage on 26 December 1985. Despite the fact that it was a love marriage, SP4 described the marriage as a missed matched from the beginning and a very bad one. The couple used to quarrel so often that SP4 had to come down from Kluang, Johor to resolve their problems. SP4 said the relationship was so bad that there was an incident when the deceased was even burnt with an iron (for ironing clothes). However despite the quarrels and differences the couple got back together and carried on living.

SP5 – Shahidan bin Md Noor

SP5, is a Forensic Pathologist attached to the Sg Buloh Hospital. On 22 October 2007, SP5 had received a request from the police (POL 161) for a post mortem to be performed on the body of the deceased, one Shentho Kaur S Jaswant Singh. The body of the deceased was identified by Sarjan Yahaya bin Adam (SP15), ASP Raja Sekaran Subramaniam (SP16) and SP4. A report was prepared as in exh. P6.

SP5's findings are as follows:

(1) External Examination

(a) The face was markedly congested with petechiae present;

(b) Marked subconjunctival haemorhages were noted;

(c) Tinge of cyanosis evident on the finger tips with areas peeling off pink nail varnish;

(d) Blood-stained fluids oozed from the nostrils;

(e) Areas of ecchymosis (bruise) present on upper chest, upper back, shoulders and upper arm;

(f) Vague bruised areas present on inner half dorsum of the right hand and on palmar aspect overlying base of ring finger which on dissection showed haematoma formation;

(g) A small vague bruise also present on inner back of the left knee which on dissection again showed haematoma;

(h) The left hand was deformed at its inner wrist which showed dislocation of the ulna;

A (i) The left hand was deformed at its inner wrist. Dislocation of the ulna; and

(j) An abrasion 1 x 1 cm about the middle dorsum or back of left hand.

B (2) Internal Examination

(a) Head – Scalp was swollen in areas when dissected with soft tissue bleedings evident in both temporalis muscles and an area of 8 x 5 cm on the right parietal eminence.

C (b) Mouth, throat and neck structure – There was marked congestion of soft tissues especially about the larynx and the base of tongue with petechiae also present on the epiglottis.

(c) Chest – Both lungs were congested.

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(d) Skeleton – No body injury except the dislocation of the left ulna on the wrist.

(3) Conclusion

E Autopsy findings suggested she most likely had died of asphyxial death. The cause of death was provisionally written as "Pending further investigation". Subsequently it was given as due to 'asphyxial due to most likely of smothering or pressure on the neck by soft broad ligature' after taking into account all the available information surrounding the death.

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It was difficult if not impossible to arrive at such conclusion without some background data. However the toxicological result may shed some light into the circumstance of her death. If a theurapeutic substance was found and exceeded the usual level, it may and could also contributed to her death on itself.

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(4) Cause of Death

1(a) Asphyxia (due to)

H 1(b) Most likely of smothering or pressure on neck due to broad or soft ligature.

In cross-examination SP5 said that he was only able to conclude that the deceased died due to the nature of asphyxia I process but he did not know what caused the asphyxia.

Further SP5 reiterated that it was rather difficult if not impossible to arrive at such conclusion without the background data.

SP8 – Dr Mohd Sukri bin Hassan

SP8 is a chemist attached to the Petaling Jaya Chemistry Department. On 31 October 2007, SP8 was the Head of the Alcohol and Toxicological Unit of the said department. SP8 had received two bottles marked as E5 (specimen of the kidney of the deceased (exh. P22)) and E6 (specimen of the blood of the deceased (exh. P22)) from one Detective Sergeant 58631 Mustapha Amran bin Haji Abdullah. Both bottles were in good condition and the seals of the Forensic Department of the Sg Buloh Hospital were intact. Upon receipt of these two bottles, SP8 had registered the case and given the Laboratory Number as (PJ) FOR 9448/07-1. An acknowledgment receipt was issued as in exh. P24.

The analysis conducted by SP8 disclosed that there were no traces of common drugs or pesticides found in exh. P22 (E5). SP8 confirmed that his analysis of exh. P22 (E6) showed that there was no significant level of alcohol detected in the said sample. *As regards exh. P22 (E6), SP8 further confirmed that there were traces of Diazepam in the said sample. However as the sample of blood sent were insufficient SP8 was not able to conduct a quantitative analysis of the said sample. A report of the said analysis was prepared as in exh. P25.*

SP7 – Jagdish Kaur Ojagar Singh

SP7 is the younger sister of the accused and the fifth in the family of six. SP7 lives quite close to the said house within the same residential area of Bandar Country Homes, Rawang, Selangor.

On 22 October 2007, SP7 received a call from her youngest sister one Dasmit Kaur informing her that she (Dasmit Kaur) had received a call from their mother who sounded rather upset. Dasmit Kaur had requested SP7 to go over to the said house to check the situation in the said house. SP7 arrived at the said house around 8.15 or 8.30am. The moment SP7

A entered the said house SP7 called for the accused and the accused responded by asking SP7 to come up to where the accused was. As SP7 was coming up the staircase, SP7 saw the accused sitting on the staircase with both his hands around the deceased, who was also in a sitting position and
B Din, his driver was standing behind the two of them. The accused who only had a towel around his body was seen crying and uttering some words which SP7 could not make out. SP7 had asked the accused what was wrong and the accused had said something but SP7 could not make out
C those words.

When SP7 was making a call to her sister, SP7 saw both the accused and Din carrying the deceased to put her on the bed. When SP7 went down to the kitchen to make some coffee
D for the accused, Din the driver came down to the kitchen to tell SP7 that he had bought some coffee in plastic bags. SP7 poured the coffee into a cup and brought it up for the accused and came downstairs.

E SP7 said she couldn't remember when was the last time she had gone to the said house and said it might be two months before the incident. According to SP7 the accused and the deceased had been married for about 20 to 25 years. The person SP7 referred to as Din was the accused's driver and
F Din's mother whom SP7 referred to as Dole was the house keeper. Both Din and his mother originated from Indonesia.

SP9 – Revathi Perumal

SP9 is a Scientific Officer in the Serology & DNA Section,
G Department of Chemistry Malaysia, Petaling Jaya. On 31 October 2007 at 3.53pm. SP9 received from Sergeant Musthapa Amran bin Haji Abdullah with ID number RF/58631 nineteen exhibits marked as E to E20 (except for E5 & E6), the details are as shown in exhs. P26 and P27 in
H connection with Rawang Report No. 8385/2007. Upon receipt of the exhibits and the request SP9 registered the case and gave a Laboratory Number as (PJ) FOR 9448/07-0 and issued a receipt as in exh. P26.

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SP9 had received 7 PDRM security plastic bags marked as E (exh. P9), E1 (exh. P29), E2 (exh. P11), E3 (exh. P13), E4 (exh. P15), E14 (exh. P20) and E20 (exh. P50), three envelopes marked E15 (exh. P39), E16 (exh. P41) and E17 (exh. P43), PDRM two packages marked E18 (exh. P45), E19 (exh. P47), PDRM four plastic tubes marked E10 (exh. P31), E11 (exh. P33), E12 (exh. P35) and E13 (exh. P37), three glass bottles marked E7 (exh. P17), E8 (exh. P18) and E9 (exh. P19). SP9 had registered the case with Lab No (PJ) FOR 9448/07-0 and issued a receipt dated 31 October 2007 (exh. P 26) at 3.53pm.

SP9 was requested to do DNA analysis on the exhibits. After the preliminary analysis, I SP9 found the following:

Exhibit E – a pink blouse (exhs. P9 & P10), E1 – a grey T-shirt (exhs. P29 & P30), E3 – a brown and yellow blanket (exhs. P13 & P14), E14 – a white/pink/brown head scarf (P20 & P21), E15 – a plastic receptacle containing soil (P39 & P40), E19 – a blue mattress (exhs. P47 & P48) bearing stains indicative of blood. SP9 also found that E19 – the mattress (exhs. P47 & P48) bore seven stains.

According to the above findings SP9 had carried out DNA analysis on all these items together with blood specimens as in E10 (exh. P32), E11 (exh. P34), E12 (exh. P36) and E13 (exh. P38). As the blood specimen of the victim was not sent for the DNA analysis SP9 had used the nail clippings from the victim in exh. E7 (exh. P17) and E8 (exh. P18) as the reference of the victim.

On comparison of the DNA profiles obtained SP9 found as follows:

1. A female DNA profile was developed from the indicated blood stains on blanket E3 (exh. P14) and blouse E (exh. P10), scarf E14 (exh. P21), mattress (exh. P48) with DNA profile developed from nail clippings E7 (exh. P17), E8 (exh. P18) both labelled Shento Kaur a/p S. Jaswant Singh.

2. SP9 found a male DNA profile with the same stain on mattress E19 (exh. P48) which matched with the DNA profile of blood specimen E10 (exh. P32) labelled Jitweer Singh a/l Ojagar Singh.

3. A female DNA profile was also developed from the same stains on mattress E19 (exh. P48) which did not match with the DNA profile developed from nail clippings E7 (exh. P17), E8 (exh. P18) labelled Shento Kaur a/p S. Jaswant Singh, blood specimen E12 (exh. P36) labelled Jamuna Rani a/p Nelamera and blood specimen E13 (exh. P38) labelled Dahlia bt. Suhaini. SP9 identified these unknown female source as Female 1.

4. A female DNA profile was developed from the indicated blood stain on mattress E19 (exh. P48) which did not match with the DNA profile of nail clippings E7 (exh. P17), E8 (exh. P18) labelled Shento Kaur a/p S. Jaswant Singh, blood specimen E12 (exh. P36) labelled Jamuna Rani a/p Nalamera, blood specimen E13 (exh. P38) labeled Dahlia bt. Suhaini and Female 1. Thus indicating that this DNA is from another female.

5. No DNA profile was developed from indicated blood stains on the grey T-shirt E1 (exh. P30) and soil E15 (exh. P40).

6. After her analysis SP9 checked all the exhibits, sealed each of the exhibits with Jabatan Kimia Malaysia security label and placed the exhibits in Jabatan Kimia Malaysia plastic bag and kept them in the strong room.

7. A report was prepared for this case and under Laboratory No. (PJ) FOR 9448/07-0 and dated 27 February 2008 (exh. P27). On 28 February 2008 at about 2.35pm SP9 handed over three copies of the report together with the exhibits to ASP Raja Sekaran a/l Subramaniam with ID No: G109913.

SP10 – Jasminder Kaur Naranjan Singh

On 22 October 2007, SP10 received a call on her mobile phone from Dr Paramjit Kaur (SP3) asking her to go to the said house to verify the news regarding the death of the deceased. Shortly after that SP10 left for the said house and when SP10 arrived at the said house SP10 asked someone in the house where the deceased was. SP10 was informed that the deceased was at the second floor of the house in the

master bedroom. SP10 went up to the master bedroom and saw the deceased body on the bed. SP10 then went to the deceased body and touched the forehead which felt cold and saw that there was no movement. Immediately after that SP10 called her sister (SP3) to confirm the state of the deceased. SP10 went to the accused to give her condolences and then telephoned her brother-in-law who is the deceased's brother (SP4) to inform SP4 about the state of the deceased.

SP10 found it rather unusual because she did not see anybody preparing for the funeral. SP10 found it a little bit odd that Din, the driver and his mother, the house keeper were carrying small items out of the house and shifting these items towards the car. SP10 assumed that since a funeral was to be held in that house those people concern should be getting the house ready for the funeral but they were not moving towards that direction. SP10 testified that it is a custom of Punjabis to congregate at the home or the place where the deceased is for the purpose of prayers and paying last respect. Usually food and drinks would also be served. In so far the deceased was concern, she didn't see any action in that direction by any members of the family or the staff. That was why SP10 said that she found it unusual. SP10 assumed that the cremation would be the next day or the same evening as she had been informed. SP10 said normally the family members of the deceased in the house would be tidying up the house and getting the house ready for the funeral but not shifting things out of the house. When other things that needed priority were not being seen to SP10 felt that something was not right. SP10 too found the accused had left the house and did not come back for some time when he should be at home to attend to the arrangements for the funeral as well as to meet people who had come to the house to pay their last respect to the deceased. SP10 had also realised that even the accused as well as the driver, Din were not at home.

SP10 had known the deceased for about 19 years. The deceased was her (SP10) sister's sister-in-law. SP10 waited for SP4 to arrive and when SP4 arrived at the said house SP10 went up with SP4 to see the deceased for the second time. At the time SP4 arrived the accused had already returned to the said house. SP4 then commenced a discussion with the accused regarding the need of a post mortem.

A The deceased had come to SP10's house at the address she had given for a visit a couple of months before she passed away. The accused was a close friend of SP10 and her mother. The deceased had stayed in SP10's house before and on one occasion the deceased had left the said house come
B to stay with SP10 and her mother continuously for a period of six months. The deceased was having problems with the accused but at the end of that period they did reconcile.

SP11 – Sergeant Mohamed Anwar bin Ahmad Tarmizi

C SP11 is a photographer attached to the Forensic Unit of the Selangor Police Contingent Headquarters. On 23 October 2007, SP11 had received an instruction from Chief Inspector Mazli bin Jusoh @ Che Kob (SP12) to follow the Forensic Team headed by SP12 to the said house. SP8 arrived at the
D said house at 2.25pm. On the instruction of SP12, SP8 had taken fourteen photographs as in exh. P52 (1) - (14) & P52 (1N) - (14N).

On 30 October 2007 at about 11.55am SP8 had received an
E instruction from one Sergeant Major Ang Fu Lian (SP13) to follow the team headed by SP13 to a condominium and at the said condominium another 29 photographs were taken as in exh. P52 (15) - (43) & (P15N) - (P43N).

F *SP12 – Inspector Mazli bin Jusoh @ Che Kob*

SP12 is attached to the Forensic Unit, Department of Criminal Investigation of the Selangor Police Contingent Headquarters. On 23 October 2007 SP12 was a Crime Scene Investigating Officer. On the same day at about 1.30pm SP12 had received
G a request from SP16 for the Forensic Unit to assist in the investigation at the said house. SP12 and his team comprising of SP11 and three other police officers proceeded to the said house and arrived at the said house at about 2.25pm. At the time SP12 arrived at the said house SP16 and a few other
H police officers were already there. After a short briefing by SP16, SP12 proceeded with his investigation.

Upon an examination of a room (exh. P52 (6) shown to him by SP16, SP12 found that the said room was rather messy
I and there were traces of soil on the dressing table in the said room (Forensic marking Number 1 - (exh. P52 (7), exh. P39

& 40). SP12 found a wet grey T-shirt with traces of blood (exh. P29 & 30) on the sink inside the toilet of the said room (Forensic marking Number 2 – (exh. P52 (8), (9) & (14)). Traces of blood (exh. P41 & 42) were also detected on the door of the cupboard at its exterior (Forensic marking Number 3 – (exh. P52 (10) & (11)). After the photographs of the relevant spots of the scene were taken, SP12 proceeded to take the soil, the wet T-shirt and the swab of the traces of the blood found on the door of the cupboard (exh. P39 & 40).

SP12 then proceeded to a room at the third floor of the said house. On examination of the said room SP12 found traces of blood on the floor underneath the bed in the said room (Forensic marking number 4 – exh. P52 (12) & (13)). The sample of the blood was also taken using the same swabbing technique (exh. P43 & P44).

The samples taken were then marked and sealed by SP12 and handed over to SP16 for further action. Proof of the handing over of these samples as well as the acknowledgement receipt is as in exh. P53.

SP13 – RF/87914 Sergeant Major Ang Foo Lian

SP13 is attached to the Forensic Unit, Department of Criminal Investigation of the Selangor Police Contingent Headquarters. On 30 October 2007 at about 10am. SP13 had received an instruction from SP16 to investigate a crime scene, that is, the accused's condominium at Platinum Villa Condominium, Taman Melati, Setapak (the 'said condominium' – (exh. 52 (15), (16) & (17)). SP13 and her team comprising of SP11 and three other police officers arrived at the said condominium at around 12.30 noon. At the time SP13 arrived at the said condominium SP16 was already there. SP16 had examined the said condominium and seized a plastic packet believed to be drugs (Forensic Marking number 4 – (exh. P52 (20) & (21)) from a cupboard (exh. P52 (19)) in the suspect's room. A mattress which was rolled and tied was found in the cupboard (exh. P52 (23) in a room next to the suspect's room (Forensic marking number 5 – (exh. P47 & 48, exh. P52 (25), (26), (27) & (28)). On examination of the toilet (exh. P52 (29) in a room next to the suspect's room SP13 found a

damp bed sheet (Forensic marking number 6 – exh. P51, P52 (30)-(33)) with stains believed to be blood hung to the grille of the window of the said toilet. A small green box containing drugs (exh. P52 (35) was found on the rack of the show case (exh. P52 (34)) in the hall of the said condominium. In one of the rooms (exh. P52 (36) & (37)), suspect number two had shown to SP16 a black bag (Forensic marking number 8 – (exh. P46, exh. P52 (38) & (39)) said to have been brought back to the said condominium by suspect number one. After the photographs of these items were taken, SP13 had wrapped and sealed these items and handed them to SP16 for further action. Proof of the handing over and receipt is as in exh. P54.

SP14 – RF/100239 Sergeant Rajan a/l Nadasar

SP14 was attached to the Genting Highlands Police Station as an Assistant Investigating Officer. On 15 October 2007 at about 9.40pm. SP14 was informed by one Lady Corporal 129652 that a Sikh lady (the deceased) had come to the police station to complain that she had been beaten by her husband in an apartment Number D7-08 Amber Court, Genting Highlands. However the deceased had refused to lodge a police report against her husband but had only wanted the police to meet her husband and to advise him not to repeat the beating. When SP14 met the deceased, the deceased told SP14 that her husband had an affair with an Indonesian lady and that the said Indonesian lady had sent an SMS to her husband and this SMS had sparked the quarrel between them, followed by the beating.

SP14 and his officer had taken the deceased back to the apartment. On reaching the apartment the deceased knocked the door of the apartment and it was opened by her son who had requested the deceased to come in alone. As soon as the deceased entered the apartment SP14 heard some noises coming from the said apartment. Shortly after that the accused had opened the door of the apartment and asked SP14 who he was. When SP14 introduced himself to the accused, the accused said he did not want to meet SP14 and demanded that the OCPD himself meet him. The accused then referred to the deceased as 'Ini perempuan sundal' and chased the deceased out from the apartment.

The deceased had lodged a police report at about 11pm. (Report No. 3486/07) and her statement was recorded. In her statement the deceased had told SP14 that it was not their first quarrel and that the couple used to quarrel so frequently. SP14 had issued Form 59 for purposes of a medical examination at the Bentong Hospital. The deceased however told SP14 that she wished to go home instead and that she would go to the Selayang Hospital for her medical examination. The deceased had asked SP14 to call a taxi and left for Rawang in that taxi.

SP15 – Sergeant Yahaya bin Adam

SP15 was and is still an Activity Sergeant at the Rawang Police Station. On 2 October 2007 a male Sikh (SP2) had come to the Rawang Police Station to lodge a report pertaining to the death of the deceased. As the SP2 had not come with the proper documentation pertaining to the identity of the deceased, SP2 was asked to come back with proof of the deceased's identity. SP2 returned to the said station in the evening with the deceased's bank book and had told SP15 that he was not satisfied as to the cause of death of the deceased. SP15 had asked SP2 to go back and that he himself would go to the house to check. At about 7pm. SP15 along with four other officers had gone to the deceased's house. On reaching the said house SP15 had asked one Sergeant Kamsiah to go up to the room where the body was placed to check the body of the deceased. After checking the body of the deceased SP15 briefed his superior one Chief Inspector Ramli about the death who had then instructed SP15 to be sent to the Sg Buloh Hospital for a post mortem to be performed. SP15 had also requested SP2 to lodge a police report in relation to the death of the deceased.

SP15 had gone to the Sungai Buloh Hospital on 23 October 2007 around 9am. At the said Hospital, SP15 met SP5 the Forensic Pathologist who was given the task to conduct a post mortem on the body of the deceased. SP5 had informed SP15 to notify his superior one ASP Raja Sekaran and a police photographer (SP6) to be present during the post mortem. Before the post mortem was performed, the body of the deceased was identified by SP16, SP4 and himself

respectively. On the instruction of SP16 the case was classified as sudden death report. At about 12 noon SP15 took the Forensic Team to conduct their investigation at the crime scene. The investigation was then taken over by SP16.

SP16 – G/10913 ASP Raja Sekaran a/l Subramaniam

On 22 October 2007, SP16 was a Senior Investigating Officer attached to the Gombak District Police Station. On the said date, SP16 received a telephone call from the Head of the Criminal Investigation Section of the District directing SP16 to attend a post mortem of the body of the deceased at the Sg Buloh Hospital. SP16 had gone to the said hospital with the driver and the photographer (SP6) and arrived at the said hospital around 11.15am. The post mortem was conducted by SP5 and SP15 was also present. During the post mortem SP16 had directed SP6 to take the photographs of the body of the deceased as well as all injuries found on the said body. The photographs are as in exh. P8 (a)-(n). SP16 had received the samples of the blood, nail clippings and the contents of the stomach and the hair of the deceased for further analysis. SP5 had informed SP16 that the cause of death was due to "lemas atau sesak nafas dengan menggunakan satu kain atau benda lembut. Perkataan yang digunakan soft ligature untuk menutup saluran pernafasan". A copy of the post mortem report too was handed to SP16 as in exh. P6.

SP16 reported the outcome of post mortem to his superior one Tuan Tan Dau Kin, the Head of the Criminal Investigation Section of the District who had then directed for further investigation to be conducted at the said house. SP16 had requested the assistance of SP12 to conduct an investigation at the crime scene and when SP12 and his team arrived at the said house, the whole crime scene was handed to SP12 for purposes of investigation. After the investigation SP12 had briefed SP16 his initial findings. All items listed in exh. P26 and P27 were seized, wrapped and sealed and handed over to SP16 who had subsequently directed one Sergeant Mustapha to send the same to SP9 for DNA analysis.

SP16 was directed by his superior to arrest the accused, his driver Khairudin and two females, one Jamuna Rani as well as the accused's Indonesian house keeper one Dariah. At the time SP16 arrived at the said house the accused was not at home. After being told by Dariah that the accused could be at the said condominium SP16 proceeded to the said condominium and arrested the accused and his Indonesian driver one Khairudin at the car park of the said condominium. The time of the arrest was around 11.50pm.

On 30 October 2007, SP16 was led to the said condominium by the accused's driver. SP16 was assisted by Inspector Izhan and the Forensic team was headed by SP12. SP16 confirmed that drugs were found in the said condominium in a drawer in the master bedroom (exh. 52 (19, 20 and 21). A mattress (exh. 48) with stains believed to be blood which was rolled and tied with a belt was recovered from the next room in the said condominium. On examination in one of the toilets in one of the rooms in the said condominium SP16 found a bed sheet (exh. P51) with stains believed to be blood hung on the grille of the window of the toilet. In the hall of the said condominium just beneath a decorative piece of a replica of the KLCC, SP16 found a box containing a substance believed to be drugs (exh. 52 (35)). In the last room which is situated at the extreme right of the condominium SP16 recovered a black bag (exh. P46) with foul and rotting smell. All items seized from the condominium are as in exh. P55 was duly signed by SP16 as well as the accused. Two expired passports belonging to Khairudin No. E600157 (exh. P56) and AA126521 (exh. P57) were also seized. SP16 had also seized an expired passport of one Dariah with No. AA126520 (exh. P58). All items seized were wrapped and sealed by SP13 and handed to SP16 for further action.

On 28 February, SP16 had gone to the Chemistry Department at Petaling Jaya to collect the Chemist report, SP16 had also received the report from SP9 as in exh. P27. On 29 February SP16 had gone to the Chemistry Department again and had received a report from SP8 as in exh. P25.

A SP16 had also sent the hand phone belonging to Dr Paramjit Kaur (SP5) to the Forensic Unit of the PDRM for analysis. The Forensic Unit was not able to make anything out from the said message.

B Both the accused's driver and his house keeper (mother and son) were charged in the court for staying in Malaysia without the proper documentation. Both the driver and the house keeper were convicted by the court and had served the sentenced imposed by the court. SP16 did not know what C happened to the case after signed up with International Islamic University for further studies.

SP17 – ASP Zuhairy bin Mohd Rashid

SP17 is a Senior Criminal Investigating Officer attached to the D Gombak District Police Station. On 17 July 2008 SP17 had taken over the conduct of the investigation from SP16 who had taken leave to pursue his further studies at the International Islamic University. According to SP17, Khairudin and Dariah the material witnesses for this case had served E their sentence under the Immigration Act and had been deported to Indonesia. His investigation showed that Khairudin bin Dulhari was released from the prison on 28 February 2008 and was surrendered to the Immigration Department on 27 February 2008 for purposes of deportation. F The checks with the Immigration Department showed that there was no entry and exit record of movements of these two individuals into and out of Malaysia neither do their names appear in the records maintained by the Immigration Department. SP17 did not know the exact address of G Khairudin and Dariah except for the fact that both mother and son originated from Central Jawa. SP17 had contacted the Indonesian Embassy to check on the where about of these two individual and was told that without a complete address of these individuals it was impossible for the H Indonesian police to locate them.

SP18 – Abdul Rauf bin Lampasi

SP18 is currently attached to the Sandakan Prison in Sabah. I On 20 August 2008 SP18 was an Assistant Commissioner in charge of the Administration of Prisoners Section at the

Sg Buloh Prison. *Vide* a letter dated the 20 August 2008 (exh. P59) SP18 had confirmed the status of a prisoner by the name of Khairudin. SP18 had confirmed that the said prisoner had been released by the prison on 22 February 2008 and was surrendered to the Immigration Department on the 27 February for purposes of deportation.

SP19 – Erni Sheila binti Mokhtar

SP19 is an Assistant Commissioner of Immigration attached to the Immigration Headquarters at Putrajaya. SP19 is currently in charge of the Depot Administration Unit of the Department of Immigration Putrajaya. On 27 February 2008, SP19 had received an ex-prisoner from the Sg Buloh Prison by the name of Khairudin bin Dulhari. SP19 had also received a letter from SP17 requesting for information pertaining to the status of an ex-prisoner by the name of Khairudin bin Dulhari. SP19 confirmed that the said Khairudin had been deported *via* Pasir Gudang Port on 14 March 2008. SP19 had confirmed the status of Khairudin *via* a letter dated 27 November 2008 (exh. P62).

SP20 – Mohamad bin Hassan

SP20 is a Senior Immigration Officer attached to the Security and Passport Section of the Immigration Department at Putrajaya. SP20 had conducted a check with the data bank which is available at the Immigration Department pertaining to the movements of people in and out of Malaysia and found out that there were no records of movements in respect of Khairudin bin Dulhari and his mother Dariah. A letter was issued to SP17 informing SP17 the result of the checks as in exhs. P60 and P61.

SP21 – ASP Mohamad Izhan Ismail

SP21 is attached to the District of Gombak Police Station. SP21 was responsible for the recording of Khairudin bin Dulhari's 112 statement (exh. ID63).

Essential Elements Of The Charge

[11] With this background, I shall now proceed to assess and evaluate the evidence in relation to the essential ingredients of the offence of murder for which the accused had been charged with. Firstly let us examine the legal requirement under ss. 299 and 300 of the Penal Code (PC) which are as follows:

> **299 Culpable homicide**
>
> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.
>
> **300 Murder**
>
> Except in cases hereinafter excepted, culpable homicide is murder:
>
> (a) If the act by which the death is caused is done with the intention of causing death;
>
> (b) If it is done with the intention of causing bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused;
>
> (c) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without such excuse for incurring the risk of causing death, or such injury as aforesaid.

[12] From the reading of the above sections of the PC, it is clear that in order to establish a *prima facie* case against the accused for the charge of murder the prosecution has to prove the following:

(1) the death of the deceased;

(2) that the death of the deceased was caused by the injury or injuries inflicted by the accused;

(3) the accused had caused the injury or injuries which resulted in the death of the deceased; and

(4) the act causing the death was committed with the *mens rea* under s. 300(a), (b), (c) or (d).

Death Of The Deceased

[13] There was ample evidence to show that the deceased had died. SP5, one Dr Shahidan bin Md Noor who is a Forensic Pathologist at the Sg Buloh Hospital who had performed a post mortem on the body of the deceased confirmed that the deceased was brought in to the Sg Buloh Hospital dead, on 22 October 2007 at about 11.15pm (exh. P6). Before the post mortem was performed the body of the deceased was identified by Sergeant Yahaya bin Adam (SP15), ASP Raja Sekaran Subramaniam (SP16) and Doctor Gurdial Singh S Jaswant Singh (SP4) respectively as that of the deceased. This fact had not been disputed by the defence. I am satisfied that this element had been proven by the prosecution.

Injuries Inflicted On The Deceased

[14] Exhibit P6 is the post mortem report prepared by SP5 and tendered in court.

[15] Although the post mortem report (exh. P6) disclosed that there were injuries sustained by the deceased, SP5 confirmed that none of these injuries had caused the death of the deceased.

[16] The physical examination of the body of the deceased disclosed that there were some injuries inflicted on the deceased however there was no conclusive proof that these injuries were in fact inflicted by the accused or that these were the injuries that had in fact led to the death of the deceased.

[17] SP5 concluded that his autopsy findings suggested the deceased most likely had died of one asphyxial death. The cause of death was provisionally written as 'Pending further investigation'. Subsequently it was given as due to 'asphyxia due to most likely of smothering or pressure on the neck by soft or broad ligature'. According to SP5 he had arrived at the said conclusion after taking into account all available information surrounding the death of the deceased.

[18] At pp. 59 and 60 of the notes of evidence SP5 said:

A Di akhir pemeriksaan ini saya telah memberikan sebab kematian sebagai asphyxia iaitu kekurangan oksigen masuk ke dalam tubuh tapi saya tidak pasti apakah yang menyebabkan boleh berlaku benda ini.

B Oleh itu untuk tujuan pengkebumian saya telah berikan sebab untuk permit untuk mengubur sebagai pending further investigations.

…

C Saya rasa sukar untuk memberikan sebab kematian yang seumpama kerana tanda-tandanya seperti asphyxia walaupun ada tetapi latar belakang kes tidak begitu ataupun sebaliknya. Jadi sukar untuk membuat kesimpulan.

[19] When cross-examined by learned counsel for the accused as
D to whether his findings were conclusive SP5 said:

For my portion it is conclusive because it is difficult to arrive at that conclusion and after taking into account the finding of asphyxia changes and not so much of the background data. I can only able to conclude that she had died due to the nature of the
E asphyxia process. (Please see p. 73 0f the Notes of Evidence).

[20] When SP5 was asked whether his remark 'It was difficult if not impossible to arrive at such finding without some background data' (Please see p. iii of exh. P6) had qualified his findings, SP5
F said:

What I am trying to say is that it is difficult to arrive at this finding. I agree with the learned counsel that it is rather difficult to arrive at this conclusion. What I am trying to say is there were findings of asphyxia nature but I do not know what cause
G the asphyxia nature. (Please see p. 74 of the Notes of Evidence).

[21] SP5 agreed to the suggestion by learned counsel that he was not able to arrive at a conclusive finding because the background data was lacking.

H **[22]** Further when re-examined by the learned DPP SP5 said:

Sebenarnya penemuan mati disebabkan oleh asphyxia adalah sesuatu yang sukar untuk diberikan sebab kematian. Kalau seseorang itu ada menunjukkan itu sahaja syak kita itu mesti tinggi
I untuk menyatakan kematian asphyxia jadi kita hendak conclude adalah sukar tanpa background data dan kita pun tidak confident

untuk sampai ke conclusion itu. Dari pengalaman saya sendiri kes-kes yang melibatkan mati disebabkan oleh asphyxia bila mana leher ditekan sama ada dicekik dengan tangan atau tali atau 'dismother' tanda-tanda asphyxia itu ada tapi background itu tidak ada tidak berani kita hendak bagi. (Please see p. 75 of the Notes of Evidence).

Tetapi kalau background tidak ada saya tidak berani untuk beri sebab kematian oleh sebab asphyxia jadi kalau ada tanda-tanda asphyxia kalau tidak ada latar belakang tak berani nak buat keputusan asphyxia sebab tanda-tanda asphyxia ini transient dan tanda-tanda akan hilang. Jadi tidak berani hendak beri sebab kematian. (Please see p. 75 of the Notes of Evidence).

...

... sebab kematian yang disebabkan oleh asphyxia ini saya perlu berhati-hati. Sebab itulah dalam conclusion saya, saya menyatakan kemungkinan besar dia mungkin ditekup hidung dia atau bahagian leher dengan sesuatu yang lembut. (Please see p. 76 of the Notes of Evidence).

[23] An essential ingredient in relation to a charge of murder under s. 302 of the PC is to establish the cause of death. In *Public Prosecutor v. Vincent Jude Xavier* [2010] 3 CLJ 754 Badariah Sahamid JC (as she then was) held at p. 761:

In a charge of murder as in the instant case, it would not be an overstatement to say that the crux of the case depends on expert evidence of the cause of death, in other words evidence that links the injuries inflicted by the perpetrator to the death of the deceased. Such evidence is ordinarily provided by the evidence of the pathologist who performed the post mortem on the deceased.

[24] I am satisfied that the cause of death of the deceased remains unproven. SP5 himself could not positively conclude that the deceased died because of "smothering or pressure on the neck due to broad soft ligature" due to lack of background information.

Who Has Caused The Injuries

[25] SP5 had stated the cause of death as:

(a) Asphyxia (due to);

(b) Most likely smothering or pressure on the neck due to broad soft ligature.

[26] The prosecution has to prove on the basis of credible and reliable evidence, either direct or circumstantial, that it was the accused who had smothered or placed pressure on the neck of the deceased by using a broad or soft ligature and that it was this act by the accused that had caused the death of the deceased. Despite, 21 witnesses having been called to testify against the accused none of these witnesses had testified by way of direct evidence that it was the accused and no one else who was the perpetrator of the crime or that it was the accused who had caused the death of the deceased.

Were There Circumstantial Evidence?

[27] What constitutes circumstantial evidence has been well illustrated by the Federal Court in the case of *PP v. Hanif Basree Abdul Rahman* [2008] 4 CLJ 1 as follows:

> Circumstantial Evidence:
>
> Since the prosecution is relying on circumstantial evidence to prove its case it would be pertinent for me to briefly cite the relevant aspect of the law on circumstantial evidence.
>
> Circumstantial evidence is defined in no better words than in the remarks in the case of *Idris v. Public Prosecutor* [1960] MLJ 296, which quoted Lord Cairns' in the House of Lords case of *Belhaven & Stenton Peerage* (1875-76) 1 App Cas 278 at p 279:
>
> In dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient but all converging and brought to bear upon the same point and when united, producing a body of illumination which will clear away the darkness which are endeavoring to dispel.
>
> The learned trial judge in *Idris v. Public Prosecutor* said:
>
> In other words circumstantial evidence consist of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test. If it leaves gaps then it is of no use at all. As I have stated this case depends entirely upon circumstantial evidence.

The Court of Appeal in the present case (*Public Prosecutor v. Hanif Basree bin Abdul Rahman* [2007] 2 MLJ 320 at p 346 held that:

> Where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope (see *Chan Chwen Kong v. Public Prosecutor* [1962] MLJ 307). There is insufficient evidence to connect the respondent with the killing. Circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test. If it leaves gaps then it is of no use at all (see *Idris v. Public Prosecutor* [1960] MLJ 96).

Abdoolcader FJ in *Dato Mokhtar bin Hashim v. Public Prosecutor* [1983] 2 MLJ 232 at p 275 said:

> Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman & Ors v. Public Prosecutor* [1982] 2 MLJ 306).

The trial judge in this case must therefore view all the evidence taken together is sufficient to prove the offence against the accused as charged.

[28] As the prosecution was relying on circumstantial evidence to prove its case I have attempted to summarise and provide the gist of the evidence of material witnesses called by the prosecution for better grasp of the facts adduced during the trial. The highlighted portion of the evidence of SP3, SP4, SP7, SP10, SP12, SP13, SP14 and SP16 respectively, are I think the evidence which the prosecution attempted to adduce to prove the ingredients of the charge by way of circumstantial evidence. In dealing with circumstantial evidence I have 'to consider not only the strength of each individual strand of evidence but also the combined strength of these strands of evidence' and ask myself whether the evidence adduced by the prosecution thus far irresistibly point to none other than to the accused as the perpetrator of the crime?

[29] There was oral evidence from SP3 that SP3 had heard the voice mail message from the deceased's phone on the night of 21 October 2007 that the deceased had broken her arm and wanted to lodge a police report. However this piece of evidence was not supported by the evidence of any Forensic expert to confirm that there was such a message recorded on SP3's mobile phone. SP16 told the court that he had sent SP3's phone the Forensic Department of the PDRM for analysis and the report was negative. SP4 had testified that the couple's marriage was a bad marriage from the beginning and throughout their marriage. SP1, SP3, SP4 and SP10 mentioned of the frequent quarrels between the accused and the deceased. SP3, SP4 and SP14 related the instances where the deceased had sustained some kind of injuries. SP3, SP4 as well as SP10 said the deceased had left their matrimonial home alone for more than nine months and gone to stay with SP3 and SP10. SP10 sensed something wrong as the accused was not preparing the house for a funeral instead, his driver Khairudin and Dariah, the house keeper were busy moving things out from the house and transferring them to the car. The accused left the house and came back much later when he should be at home making the necessary arrangements for the funeral. SP12 mentioned of traces of blood found on the floor underneath the bed in one of the rooms, the traces of blood on the cupboard in the room and soil on the dressing table. There was also evidence that the accused, the deceased and their young son (SP1) were living separately. The other piece of evidence was the accused did not attend the deceased's funeral.

[30] Although there were some incriminating items being seized from the said house as well as the said condominium, however there were no significant or positive findings made by SP8, the Toxicological expert and SP9, the DNA expert in regards to these items as to connect them to the accused. As I have mentioned earlier the Forensic Pathologist who performed the post mortem himself was not able to conclusively tell the court how the deceased had died as he did not have the benefit of sufficient background data to assist him with his findings.

[31] On the maximum evaluation of the evidence adduced before me I am satisfied that the prosecution had left many gaps in its case and up to this moment I am still in doubt as to how the deceased had succumbed to her death. Bearing in mind the

principles of law as regards to circumstantial evidence as enunciated in the cases that I have quoted above I find that there is insufficient circumstantial evidence to connect the accused to the offence of murder. I am satisfied that the circumstantial evidence adduced by the prosecution fall short of the standard required by the law. Hence all the essential ingredients of murder except for ingredient number (1) had not been proven by the prosecution on the standard required by s. 180 of the CPC and as illustrated by the landmark cases of *Looi Kow Chai & Anor v. Public Prosecutor* [2003] 1 CLJ 734; *Balachandran v. PP* [2005] 1 CLJ 85 and *PP v. Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457.

Failure To Call Material Witnesses

[32] The prosecution had called 21 witnesses to prove its case. However the prosecution had failed to call at least two material witnesses whose testimonies are crucial to its case. They were Khairuddin, the accused's driver and his mother Dariah, the accused's house keeper who are material witnesses to the case, who would be able to provide some missing links in the prosecution's case. Unfortunately no efforts were made by the prosecution to call these witnesses to testify. The absence of Khairudin, the accused's driver and Dariah, the house keeper had left many questions unanswered. The prosecution had failed to discharge the onus placed upon them to exclude the possibility of these witnesses having been involved with the commission of this offence. There was the evidence from SP7 that at the time she arrived at the said house around 8.15 to 8.30 in the morning and as she was going up the staircase to meet the accused, SP7 saw Khairudin standing behind the accused and the deceased. The said Khairudin too was seen by SP7 helping the accused to carry the deceased to the bed. SP10 testified that both Khairudin and his mother Dariah were busy moving things out of the house. Khairuddin had told SP16 that the black Mont Blanc bag (exh. P46) was brought to the said condominium by the accused. These two witnesses ought to have been called to close the gaps in the prosecution case.

[33] The prosecution attempted to produce the statement of Khairuddin made under s. 112 of the CPC (ID 63) pursuant to s. 32 of the Evidence Act 1950. However it was rejected by the

court as the prosecution had not fulfilled the prerequisite under the said section. Pursuant to s. 32 of the Evidence Act 1950, the prosecution has to prove that the witnesses could not be found or that his attendance could not be procured without amount of delay and expense. From the evidence of SP17 it is obvious that no diligent search and reasonable exertion were made to procure these witnesses for the trial. It is the duty of the police to keep track of the witnesses whereabout and take precautionary measures that they are informed of any change of address or where about. Please see *Public Prosecutor v. Nordin Awang* [2000] 1 LNS 288; *PP v. Karim Ab Jaabar* [2002] 7 CLJ 191; *Pang Chee Meng v. Public Prosecutor* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265.

[34] The prosecution could have resorted to the provision of s. 396 of the CPC if it had been vigilant but had not done so due to its own sheer negligence. The failure to call these witnesses will result in the provision of s. 114(g) of the Evidence Act 1950 to be invoked against the prosecution.

[35] I wish to express my observation that based on the evidence adduced throughout the trial, even the learned DPP who had taken over the conduct of the matter towards the end of the trial, herself found it difficult to stand and submit that a *prima facie* case had been made out against the accused for the offence he was charged with. This is clearly reflected in the learned DPP's written as well as oral submission in court.

Conclusion

[36] For the above reasons, I find that the prosecution has failed to prove a *prima facie* case against the accused. This is so, as three out of four essential ingredients of murder pursuant to s. 302 of the PC were not made out on the facts before the court. In the circumstances, the court is left with no choice but to discharge and acquit the accused without defence being called.